IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 827 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHMAD SALIM SABIR HUSSEIN QURESHI - Appellant
(orig. accused)

Versus

STATE OF GUJARAT - Respondent

Appearance:
1. Criminal Appeal No. 827 of 1996
MR YOGESH S LAKHANI for the Appellant
MR KP RAVAL, APP for the Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.K.TRIVEDI

Date of decision: 24/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellant challenges the judgement and order dated 9th July 1996 of the learned Sessions Judge, Rajkot in Sessions Case No. 192 of 1995 convicting him for the offence under section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as `the said Act') and sentencing him to suffer rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lakh, in default to undergo further rigorous imprisonment for a period of 3 years.

2. As per the Charge exh.5 framed against the accused, he was found to be in possession of six packets of `charas' in all weighing 910 grams on 5th August 1995 at 5.50 p.m. at Rajkot. The prosecution version is that, on an information received by the Police Inspector Shri G.B.Kadel of `B' Division Police Station of Rajkot city to the effect that Mohammad Salim Qureshi had come to the house of Bai Shanti, near a cement factory on Bhavnagar road within the area of the police station from Uttar Pradesh, and that he was having quantity of illicit `charas' which he was planning to sell, the police inspector after making necessary entries in accordance with the provisions of section 42(2) of the said Act and informing his superior the Assistant Police Commissioner Shri Mahant, who had also come there, proceeded alongwith the panchas and police party to the house of Shanti, which was in a building known as `Chandani'. When the gate of the `dela' was opened, Mohammad Salim Qureshi i.e. the accused was found there with a suitcase. After inquiring about his name from him, he was asked to open his suitcase and when he opened the suitcase, six packets wrapped in plastic material were found from it. The accused gave his name as Mohammad Salim Qureshi and said that he had come from Kanpur. A yadi was sent to call the Scientific Officer who was brought there in a police jeep, and he weighed and examined the amterial and opined that it was narcotic material `charas'. The material was sealed in six packets and seized under a panchnama. According to the prosecution, on analysis by the Forensic Science Laboratory, it was found to be `charas'.

3. The trial Court, on the basis of material on record by its elaborate judgement, held that the accused was in possession of `charas' for which he had no licence or permit and had committed the offence under section 20(b)(ii) of the said Act. The trial Court found that the provisions of section 42(2) were duly complied with, because, the information received by the police officer was taken down and a copy was given to his immediate

officer superior. It was also held that the inspector was an officer of a gazetted rank and in any event, his superior the Assistant Commissioner of Police Shri Mahant was also present at the time of seizure of the muddamal `charas' from the suitcase opened by the accused and belonging to him. It was also held that the provisions of section 50 of the said Act were duly complied with. The trial Court further held that there was no substance in the contention raised on behalf of the accused that there was breach of the provisions of section 57 of the said Act, because, it was established that a full report of the particulars of the arrest and seizure was made by the concerned officer to his immediate official superior as required by the provisions of section 57 of the said Act. It was further held that the muddamal packets had reached the Forensic Science Laboratory in a sealed condition and there was no valid reason to infer that any one had tampered with the muddamal after it was sealed. The trial Court, therefore, convicted the accused holding him guilty for the offence under section 20(b)(ii) of the said Act and imposed on him the above sentence.

4. The learned counsel appearing for the appellant very fairly submitted that he was not raising any contention on the ground of violation of any provisions of the said Act, more particularly section 42(2) and section 50 of the Act, because, the possible contentions which were raised in the trial Court stand concluded by the decision of the Supreme Court in Gurbax Singh v. State of Haryana, reported in JT 2001 (2) 330 in which it was held that Section 50 of the said Act would be applicable only in those cases where the search of the person is carried out. The Court referred to its earlier decision in Kalema Tumba v. State of Maharashtra reported in (1999) 8 SCC 463, in which while considering the mandatory requirement of section 50 of the said Act, the Supreme Court held that only when the person of an accused is to be searched, then he is required to be informed about his right to be examined in presence of a Gazetted Officer or a Magistrate. The Court also referred to the decision in State of Punjab v. Baldev Singh, reported in (1999) 6 SCC 172, in which it was held; "On its plain reading, section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc.". In the present case, the muddamal `charas' was found from the suitcase which was carried by the accused. The learned counsel, therefore, rightly did not raise the contention on the basis of State of Punjab v. Jasbir Singh, reported in 1996(1) SCC 288, which stood overruled as observed in paragraph 5 of the judgement of the Supreme

Court in Gurbax Singh (supra). A Division Bench of this Court in Nurmohmed Musabhai v. State of Gujarat, reported in 1999 (1) GLH 177 negatived the contention that even in case of a gazetted officer, the procedure of person being searched in presence of gazetted officer upon option being exercised, must be followed. Similar view was taken by the Division Bench of this Court in Bherumal Viraji Kumavat v. State of Gujarat, reported in 1999 (1) GLH 264. The learned counsel, therefore, rightly did not raise the contention that there was violation of the provisions of section 42(2) or section 50 of the said Act.

5. It was contended on behalf of the appellant that there appeared to be a possibility of tampering with the muddamal which was seized under the panchnama exh.26. In this regard, it was submitted that though the Assistant Commissioner of Police Shri Mahant had stated that he had put his signatures on the slips which were affixed on the packet in which the muddamal `charas' was kept, no such slips were forthcoming. Moreover, though the Scientific Officer Shri Aashar is said to have written the weight and number of articles in a slip of paper which as per the panchnama and the report exh.16 of Shri Aashar were placed in the packets alongwith the muddamal `charas', no such slips in the hand of Shri Aashar were forthcoming. Moreover, though as per the deposition of Police Inspector Shri Kadel, Assistant Commissioner of Police Shri Mahant had put his signature below the complaint, no such signature was seen. It was further contended that important witnesses like Kaliben and Shantaben were not examined. Even the constable Shri Rameshbhai who is said to have received the information and passed it on to P.I. Shri Kadel and the Scientific Officer Shri Aashar have not been examined. Therefore, adverse inference should be drawn against the prosecution. It was also contended that the prosecution has not been able to prove the ownership of the house where the raid took place and the fact that the electric bill which was seized was in the name of some Yusufbhai B. Salot brought about an inconsistency as to the place where the raid had actually taken place, the benefit of which should go to the accused. It was finally contended that the accused did not know Gujarati and a `purshish' exh.40 was filed on 15th June 1996 by the learned counsel for the accused declaring that he was informed by the accused that the accused was not knowing or understanding Gujarati and was totally ignorant of Gujarati language and could understand only Hindi. This `purshish' was given after the evidence for the prosecution was closed by `purshish' exh.39 dated 15-6-1996. It appears that because of this

`purshish', the all the questions put in the statement under section 313 of the Code of Criminal Procedure were translated in Hindi to the accused. The learned counsel submitted that the trial was vitiated since the accused did not know what was happening in the proceedings which were held against him.

6. The learned Additional Public Prosecutor submitted that the depositions of P.I. Shri Kadel, the Assistant Commissioner of Police Shri Mahant, the panch witness Jayantilal and the documentary evidence clearly establish that the muddamal `charas' was seized from the accused and duly sealed in six packets which were delivered to the Forensic Science Laboratory in a sealed condition and on analysis, it was found that the material was `charas'. It was submitted that the slip on which the weight of the articles and the number of sticks of the said material were written by Shri Aashar must have been there when the sealed packets were opened in the Forensic Science Laboratory, because, the number of sticks and weight of that material was mentioned when the muddamal was opened and noted down. It was submitted that there was clear reference in the report of the Forensic Science Laboratory that all the packets were in a sealed condition and that the slips bearing signatures of the panchas were found from inside each parcel and on the labels on each packet. It was submitted that the contents and weight of muddamal articles fully tallied when the packets were opened in the Forensic Science Laboratory at the time when the articles were weighed and there was no scope for any tampering of the articles after they were seized till the time they were opened by the officers of the laboratory. It was submitted that Shri Mahant's signature below the complaint was not material and there was nothing to doubt the genuineness of the complaint lodged by P.I. Kadel. It was also contended that there were no two seals affixed, as sought to be canvassed on behalf of the appellant, and there was only one seal which was affixed on each packet. It was also argued that there was no suggestion made regarding any malpractice with respect to the muddamal seized and forwarded to the laboratory, nor was there any suggestion made about the slip written by Shri Aashar showing the weight and number of sticks kept in the packet and therefore, no adverse inference can be drawn against the prosecution over such trivial matters. The learned Additional Public Prosecutor relied upon the reasoning adopted by the learned trial Judge for holding that the appellant was guilty of the said offence.

7. The prosecution witness Ganpatlal Balmukund

Kadel, who was at the relevant time Police Sub Inspector, `B' Division Police Station, Rajkot, has deposed at exh.10 that, while he was on duty on 5th August 1995, he received an information in the evening that a person by name Salim Mohammad Qureshi had come to the house of Shanti, who was residing near a cement factory on the Bhavnagar road from Kanpur, and that he was having a large quantity of illicit `charas' and was arranging for its sale. This witness, therefore, made the necessary entry in accordance with the provisions of section 42(2) of the said Act and informed about it in writing to his superior officer Assistant Police Commissioner Shri Mahant, who had come there and taken the signature of Shri Mahant on a copy in lieu of having given such information in writing to him at 5.15 p.m. Thereafter, panch witnesses who were called had come and they were apprised of the information. After recording the initial part of the panchnama, the panchas and the police party proceeded for their destination at 5.45 p.m. He has stated that head constable Mahendrasinh, head constable Rameshbhai, constable Sahdevsinh, constable Mehul, constable Velubha and constable Shantubha, were in the raiding party. In the other jeep, the Assistant Commissioner of Police Shri Mahant had followed. They reached near the building `Chandani' in respect of which the information was received at 5.50 p.m. and stopped their vehicle. On opening the gate of the `deli', they met the accused with a suitcase and on asking his name, he had given his full name and address. He was told that an information was received that he was carrying illicit `charas' and therefore, he was to be searched. This witness also informed him that he was a gazetted officer, still however, he should state whether he wanted to be searched by any other gazetted officer, which offer he refused. Thereafter, he was searched in presence of the panch witnesses and a sum of Rs.90/-, a bundle of bidis and key to the suitcase were found from his clothes, which articles were allowed to remain with him. He was asked to open the suitcase. He opened the suitcase with the key which was with him, in the presence of the panchas, who examined the same and found six different bundles wrapped in plastic and the clothes. Each bundle was having cylindrical black material which the accused described as `charas'. The material was seen by all and on smelling, it was found to be having a peculiar smell. This witness, therefore, sent a written `yadi' for calling the Scientific Officer and the `yadi' was sent through constable Mehulbhai, who brought the Scientific Officer Shri Aashar alongwith him at about 6.50 p.m. Shri Aashar examined the material in presence of the panch witnesses. He examined the material from each of

the 28 sticks and stated that it was `charas'. The total weight of the material was 910 grams. There were four sticks of `charas' in each of the three packets, while one was having six and the other three and half sticks, while the sixth packet was having four and half sticks. According to this witness, Shri Aashar had weighed the material and counted the sticks and noted them in slip which was kept in the packet. Each packet was wrapped in a white paper and a slip signed by the panch witnesses was kept in a cover, which cover was placed on the packet and the slips signed by the panch witnesses were put thereon and seal of the Police Inspector was affixed. He has further stated that thereafter Bai Shanti's room was searched, but nothing objectionable was found therefrom. Bai Kali who was described as the owner of the building, was also present and she had given the electric bill of the year 1994 in respect of the said building. The accused was arrested for the said offence at 8.15 p.m. This witness has proved the contents of the complaint exh.11. He has also proved the yadi exh.12 which was sent for calling the Scientific Officer. He had taken down the information in writing as required by section 42(2) of the said Act, a copy of which is at exh.14, which also shows that it was forwarded to the Assistant Commissioner of Police. The Assistant Commissioner of Police put his signature thereon in lieu of having received this intimation. The contents of the complaint exh.11 fully corroborate the version of this witness exh.14. The Deputy Police Commissioner had, on 7-8-1995, forwarded the six sealed packets of muddamal `charas' to the Forensic Science Laboratory. This witness has also proved the report exh.16 which was prepared by Shri Aashar, in which the number of sticks and their weight in six packets was noted down. There were six packets in all containing 28 sticks and weighing 910 grams as noted in that report. He had opined that, prima facie, all these 28 sticks appeared to be cannabis sativa (charas). In his cross-examination, he has maintained that the accused was asked whether he would like to be searched by any other gazetted officer, but he had refused the offer. He has denied the suggestion that the muddamal packets were not duly sealed or that the slips with signatures of the panchas were not placed thereon. He has denied that the documents exh. 11, exh.12, exh.13, exh.14 and exh.16 were subsequently got up. The deposition of this witness clearly establishes that the accused was found to be in possession of the muddamal `charas', which he had kept in his suitcase and which was seized in presence of the panchas after he opened the suitcase on 5-8-1995 in the evening at about 5.50 p.m. It is also established that, during the seizure proceedings, the Scientific Officer

Shri Aashra was called and he had weighed the muddamal articles and given his opinion that, prima facie, the material appeared to be `charas', as stated in his report exh.16. The muddamal sealed packets were forwarded to the Forensic Science Laboratory. These packets were containing, in all, 28 sticks of `charas' having total weight of 910 grams. His evidence also discloses that he had scrupulously complied with the provisions of section 42(2) as well as section 50 of the said Act since the muddamal was recovered from the suitcase belonging to the accused after he opened the same. Section 50 of the said Act will therefore have no application to the present case in view of the decision of the Supreme court in case of Gurubax Singh (supra).

8. Panch Jayantilal Jamnadas, in his deposition exh.25, has narrated the particulars of the search and seizure which was carried out on 5-8-1995 in the evening and has stated that, after drawing the first part of the panchnama exh.26, they had proceeded to the place near the building named `Chandani'. When the gate of the `dela' of those premises was opened, they met the accused who was having a suitcase. The police had asked his name. On search from his body, some cash, bidi bundle etc. were found. When asked to open the suitcase, he opened it with his key and they found inside the suitcase that there were plastic bundles having six packets wrapped in the clothes. Thereafter, an officer was called from the Laboratory who weighed the sticks in the packet which were opened and analyzed them and declared that it was a narcotic substance. Thereafter, the substance was sealed and a slip containing signatures of the panchas was affixed on each packet and then it was kept in a brown paper cover and on that cover, the slip signed by the panch witnesses was affixed and tied with a thread and a seal was attached thereon. This evidence clearly shows that there was only one seal of office affixed on the packet after it was put in the brown paper cover and therefore, there was no question of there being two seals of office affixed, one in the inside packet and the other on the outer, as was sought to be contended on behalf of the appellant. This witness is fully corroborated by the panchnama exh.26 in which the procedure which was followed at the time of seizure of the muddamal `charas' has been set out in detail. It has been stated in the panchnama exh.26 that there were in all six packets of the muddamal `charas' sticks. Their weight and number was noted in a slip by Shri Aashar, which was kept inside and that packet was wrapped in a white paper on which the slip containing the signatures of the panchas was placed in a cover and a string was

tied, on which, a slip signed by panchas was put and seal of the Police Inspector, Rajkot city was affixed. The theory of two seals is, therefore, misconceived and not warranted by the evidence on record. It was propounded on the basis of the deposition of Jayantilal exh.25 in paragraph 2 in which he has said that, after the material was analyzed by the Scientific Officer, it was sealed. However, that expression `sealed' had relevance to wrapping up the material itself and not to affixing of the seal of the office on the material. It is clearly stated that, after the material was sealed, the slips containing signatures of the panchas were placed on the packet and thereafter, the packet was kept in the brown paper cover, on which again a slip containing the signatures of the panchas was applied and after tying it with a string, the seal was affixed. Therefore, there was no question of any two seals being affixed and the expression that the articles were sealed in a packet in Jayantilal's deposition, cannot be construed so as to mean that the official seal was applied on the material directly before the packet was prepared and finally sealed.

8.1 The deposition of panch Jayantilal exh.25 clearly establishes that the muddamal articles were duly seized under the panchnama exh.26, which in turn fully corroborates the version of this witness. There is nothing in the cross-examination of this witness which can raise any suspicion about the genuineness of the seizure of the muddamal articles.

9. Ganpatprasad Banarasiprasad, who was at the relevant time working as a writer-head, has deposed at exh.23 that, on 5-8-1995 at about 9.30 p.m., while he was on duty at the `B' Division Police Station, Rajkot, Shri Kadel had given to him six muddamal packets and the muddamal suitcase and the electric bill, which he had received under receipt No. 221. Thereafter, on 8-8-1995, these six sealed packets were entrusted to constable Khimajibhai Dhanajibhai, who had brought a report, after taking his signature in the muddamal receipt. He has proved his signatures on the muddamal articles 1 to 6. Thus, the muddamal remained in secured state after it was sealed and until it was handed over to constable Khimajibhai on 8-8-1995 for being taken to the Forensic Science Laboratory.

9.1 Constable Khimajibhai Dhanajibhai, in his deposition exh.28, has stated that he had taken the muddamal alongwith the necessary papers to Junagadh Laboratory and delivered it in the same condition in

which he had taken it from the police station and obtained a receipt in respect thereof. Thus, the evidence discloses that the muddamal has reached safe and in a sealed condition to the Forensic Science Laboratory, Junagadh.

9.2 Bakulbhai Vithalji Jani, who had succeeded as officer of the `B' Division Police Station, Rajkot, in his deposition at exh.29, has proved the letter of the chemical analyzer at exh.30, the receipt of the chemical analyzer at exh.31 and the analysis report at exh.32. The receipt exh.31 dated 8-8-1995 shows that the muddamal forwarded to the Forensic Science Laboratory was received by the Deputy Director in sealed condition, as stated in the receipt. These muddamal six packets were opened and as noted in the communication exh.32 addressed to the police inspector, these six packets were found to be having the numbers of sticks and their weight as mentioned in respect of each of the stick packets. It was stated that, "each parcel also contained a panch slip inside the parcel and on a label bearing signatures of panchas made before the police officer".

9.3 The result of the analysis which was forwarded by the Scientific Officer alongwith this letter exh.32 showed that all the articles of exhibit 1A to 1D weighing 130 grams, exhibit 2A to 2D weighing 160 grams, exhibit 3A to 3D weighing 140 grams, exhibit 4A to 4D weighing 140 grams, exhibit 5A to 5F weighing 190 grams and exhibit 6A to 6F weighing 150 grams (i.e. in all weighing 910 grams) were on the basis of chemical analysis and botanical examination, found to be `charas' as defined in the said Act. The Biology Division reported that all these articles contained botanical material of cannabis sativa.

10. The prosecution witness Chandulal Motiram Mahant, who was at the relevant time Assistant Police Commissioner, has in his deposition exh.27, stated that he was present at the time when the panch and the police party had seized the material. He had followed in his own jeep when the police party had proceeded to the place in respect of which information was received on 5-8-1995 and the accused was found to be having a suitcase which was opened by him with his key and the muddamal `charas' was found in six packets, which were recovered from the suitcase. He has also deposed as to the fact that the officer Shri T.N. Aashara of the Forensic Science Laboratory, Rajkot was called and he had weighed the `charas' sticks. He has stated that there were six packets of `charas' of which the first packet weighed 130

grams, the second weighed 140 grams, the third weighed 150 grams, the fourth weighed 160 grams, the fifth weighed 140 grams and the sixth packet weighed 190 grams, and that the total weight was 910 grams. He has also stated that there were, in all, 28 sticks of `charas' which were examined by the Scientific Expert, who had given his preliminary report that the material was `charas'. The number of sticks found in six packets as well as the weight of sticks found in each packet, as narrated by this witness, is fully borne out from the other evidence on record. Even in the panchnama exh.26, these particulars are mentioned. The same particulars are mentioned in the report exh.32 of the Forensic Science Laboratory. The articles tallied in number as well as in weight in respect of all the six packets. In the report exh.16, which was initially submitted by Shri Aashar who was called for examining the material when it was being seized, refers to the same number of sticks, but surprisingly there appears to be one overwriting at a place where 130 grams was written as the weight of the three and a half sticks in the first packet, which has been changed to 160 grams. We refrain from commenting on this change which seems to be either a crude attempt to confuse or a sheer mistake. In the original report exh.16, which we have perused, we found that the weight of the material in the first packet was written as 130 grams and there were three and half sticks in that packet. But that 130 grams is overwritten as 160 grams by changing figure `3' to figure `6'. However, in the panchnama as well as in the Forensic Science Laboratory Report exh.32, as also in the oral evidence of the police witnesses, the weight of these 31.1/2 sticks was 130 grams. The fact that there were in all 28 sticks is also mentioned in the report of Shri Aashar exh.16. The weight and number of sticks in each of the other five packets is clearly mentioned and fully tallies with particulars written in the panchnama exh.26 as well as those found in the report exh.32 of the Forensic Science Laboratory. Therefore, there is no substance in the contention that there may have been any tampering done with the muddamal articles after they were seized on the basis of such overwriting over 130 grams, which has been changed to 160 grams. There is also no substance in the contention that the slip on which Shri Aashar had noted down the weight and number of sticks is not found. There is nothing to show that such slip was missing. In fact, the opening part of the letter exh.32 under which the report was forwarded by the Forensic Science Laboratory showed the number of sticks which were found in each of the six packets with their respective weight, which obviously must have been noted on the basis of the slip

containing the particulars of the number of articles and weight. As noted in the Forensic Science Laboratory Report exh.32, each parcel contained (i) a panch slip inside the parcel, and (ii) panch slip on the label. These were bearing signatures of two panch witnesses which were put before the Police Inspector, `B' Division Police Station, Rajkot, as is borne out from the deposition of the panch exh.25 and panchnama exh.26, as also from the deposition of P.S.I. Shri Kadel. We are, therefore, fully satisfied that the muddamal `charas' was seized from the accused who was carrying it in his suitcase on 5th August 1995 inside the `dela' of the house known as `Chandani' pursuant to the information which was received by the Police Inspector Shri Kadel and such seizure was made in presence of panch witnesses and Assistant Commissioner of Police Shri Mahant, and that these articles, on analysis, were found to be `charas'. The trial Court was, therefore, fully justified in holding the accused guilty for the offence under section 20(b)(ii) of the said Act.

11. It was tried to be contended before us that the accused was not knowing Gujarati and therefore, the proceedings were vitiated. This contention is wholly misconceived. It was only after the prosecution evidence was closed by `purshish' exh.39 given on 15-6-1996, that it suddenly occurred to the learned counsel appearing for the accused to file `purshish' exh.40 on 15-6-1996 which has gone in as a `purshish' of the advocate of the accused for closing evidence in the entry made in the Rojnama at serial no. 39. The accused was represented by a Gujarati knowing counsel, who had not only a duty towards his client, but had also a duty towards the Court and if at all his client did not understand Gujarati, he should have immediately disclosed that fact to the Court rather than wait till the prosecution evidence was closed. It appears that, after this `purshish' was given, when the statement under section 313 of the Code of Criminal Procedure was recorded, the learned Judge put the translated version in Hindi of the questions to the accused, who has replied to all those questions, and it has been certified below the statement under section 313 of the Code of Criminal Procedure that the accused was made to understand all the questions which were put to him under section 313 of the Code of Criminal Procedure in Hindi, and that he had answered the same after understanding them. In fact, when the Charge exh.6 was read over to the accused in Gujarati, he had stated that he had understood the Charge and he had pleaded not guilty, and claimed to be tried. It appears that the `purshish' exh.40 stating that the accused did not know

Gujarati was placed on record from a strategic view point rather than from the point of view of any real handicap suffered by the accused. We are not quite satisfied that the accused did not know Gujarati and it appears from the fact that everyone kept quiet on this aspect till the entire prosecution evidence was recorded, it appears that the `purshish' exh.40 has been filed only for the purpose of planting a contention.

11.1 Under section 279(1) of the Criminal Procedure Code, it has been provided that, whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him. Even if it is assumed that the appellant did not know Gujarati, the violation of the provisions of section 279(1) of the Criminal Procedure Code would be merely an irregularity and it is not shown in this case that there was any prejudice caused to the appellant on this count. Since the advocate appearing for the accused was, as stated by the learned counsel for the appellant, a well experienced advocate knowing Gujarati, he is presumed to have taken care of the interest of his client and to have proceeded to cross-examine the witnesses and handle the proceedings after receiving instructions from him. It must be presumed that the accused was acquainted of the proceedings from time to time by his counsel since the accused was present all throughout and the evidence was recorded in his presence. No inkling was given to the Court that the accused did not know Gujarati right from the point when his plea was recorded till the prosecution evidence was closed, which indicates that the accused or his counsel did not experience any handicap in the proceedings when the evidence was given by the witnesses in Gujarati. In our opinion, the alleged irregularity has not resulted in any injustice or prejudice to the appellant.

11.2 As provided in section 465(1) of the Criminal Procedure Code, subject to the provisions contained in the Code, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal on account of any error, omission or irregularity in any proceedings before or during the trial or in any other proceedings under the Code unless in the opinion of the Court, a failure of justice has in fact been occasioned thereby. As provided in sub-section (2) of section 465 of the Criminal Procedure Code, in determining whether any error, omission or irregularity in any proceeding under the Code, has occasioned a failure of justice, the Court shall have due regard to

the fact whether the objection could and should have been raised at an earlier stage in the proceedings. It is evident from the record, for which there is no dispute, that the objection that the accused did not know Gujarati was not raised at any earlier stage of proceedings and was raised for the first time when `purshish' exh.40 was filed by the counsel for the accused after the prosecution evidence was closed by `purshish' exh.39. Such a belated objection that the accused did not know Gujarati or did not understand it, cannot be a ground for assailing the proceedings in which he participated all throughout through his counsel and by remaining present. Even in `purshish' exh.40, the counsel rested by declaring that the accused did not know Gujarati and did not moved the Court on the ground that any prejudice was caused. In context of the provisions of section 361 (1) of the Criminal Procedure Code, 1898 by the Supreme Court in paragraph 10 of its judgement in Shivanarayan Kabra v. The State of Madras, reported in AIR 1967 SC 986, the Hon'ble Supreme Court, in a case where it was contended that the accused did not know Tamil but no such plea was raised when the witnesses were examined, took the view that no prejudice was caused when the two eminent counsel knowing both Tamil and English had represented the accused - appellant at the trial and the irregularity was cured by section 537 of the Code of Criminal Procedure, 1898.

12. In view of what we have said hereinabove, we do not find any infirmity in the impugned decision and are in full agreement with the reasoning adopted and the findings reached by the trial Court for convicting the accused. The appeal is, therefore, dismissed.

OCTOBER 24, 2001 [R.K.ABICHANDANI, J.]

[D.K.TRIVEDI, J.]

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